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File No. O. Sales-Tax 1/52

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Subject:— Opinions under the Bombay Sales Tax Act 1946

File No. O. Sales Tax/52

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C O N T E N T S.

Legal Department File No. C.Sales Tax/52.

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Section 12-1A of the Bombay Sales Tax Act, 1946, prescribes a special mode of recovery of the sales tax from any person from whom any account is due or may become due to dealer by giving notice. Sub-section (5) of that section provides that where a person to whom a notice under this section is served proves to the satisfa tions of the Collector that the sum demanded or any part thereof is not due to that dealer or that he does not hold on any money for or on account of the dealer, then nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof as the case may be to the Collector. In the present case, it is admitted by Shri Patwardhan that he had borrowed a sum of Rs. 10,000 from the dealer who has defaulted in payment of the sales tax and has migrated to Pakistan. Shri Parwardhan, on whom a notice was served under sub-section (1) of section 12-1A is contend ing that the debt was time-barred by the time the notice was served on him. If this contention is correct, it is evident that on the date on which the notice was served on Shri Patwardhan nothing was due from him to the dealer and consequently the arrears of the tax cannot be recovered from Shri Patwardhan under section 12-1A . However, under sub-section (5) of the burden of proving that the debt is time barred is upon Shri Patwardhan. Beyond the mere statement made by the Solicitor of Shri Patwardhan in his letter to the Assistant Collector of Sales Tax at page 3 ante, there is nothing to prove that the debt due from Shri. Patwardhan on promissory note was really time barred by the time the notice was served on him. Consequently, the Collector should call upon Shri Patwardhan to prove under sub-section (5) of section 12-1A that the debt due from him was time-barred.

Sd. P.N.Lad.
25/2

S.S.

Remembrancer of Legal Affairs.

U.R. to F.D. No. 3101, dated the 26th February 1958.

VDP. 18-6-56.

This case was discussed with the D.S.,F.D. His attention was invited to the reasons underlying the opinion given by the Advocate General on the 22nd of September 1950 regarding the interpretation of article 286(1). On the basis of that reasoning it would no doubt be competent for the State of Bombay to tax the sales although a dealer may actually be a resident of another State. However, the question of taxing such sales is not of really great magnitude. In so far as the sales are sales to dealers in the State of Bombay, such sales would be netted by our sales tax machinery. There may remain a very small fraction of sales by dealers direct to consumers. It is not quite clear whether their magnitude is such as to require co-ordinate action of the kind proposed by the Madhya Pradesh Government. The best course in such cases would be to have a scheme of purchase tax in addition to sales tax.

Sd. P.M.Lad.
26/2

S.O.
Remembrancer of Legal Affairs.

U.R. to F.D. No. 3197, dated the 27th February 1952.

VDP. 18-6-56.

Cash discount Sales Tax Act, 1946 - Sec. 2(h) (i).

The question for R.L.A's consideration is whether reductions of the amount of the bill at the time of eventual collection which have been carried separately into a "vatav" account in the dealer's books of account, will fall within the meanning of the phrase "cash discount allowed according to trade practice" as used in section 2(h) (i) and would be excluded from the "sale price". The term "sale price" is defined in section 2(h)(i) as follows :-

"Sale price" means the amount payable to a dealer as v valuable consideration for -

(i) the sale or supply of any goods, less any sum allowed as cash discount according to trade practice, but including any sum charged for any thing done by the dealer in respect of the goods at the time of or before delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is separately charged."

The phrase "any sum allowed as ~~xxx~~ cash discount according to trade practice" which occurs in this defi nition will have to be given, in the absence of any indicat tion to the contrary, its ordinary meaning. "Cash discount is the discount allowed for prompt payment of an account. It does not necessarily imply that the payment is made immediately the goods are sent. The time varies according to the length of time for which the debtor is allowed credit. The usual rate of cash discount is "2½ per cent monthly". It is offered as an inducement for prompt payment, and is not, of course, allowed in case of delayed payment beyond the recognised period" (vide Pitman's Business Man's Encyclopaedia and Dictio nary of Commerce, Vol. I p.334). To be a "cash discount therefore the discount must be offered as an inducement for and in consideration of prompt payment, In the

In the present case, discount does not appear to have been given as an inducement for prompt payment; but on the contrary it is allowed as a gratuity to staff of the purchaser or on some such ground. The short recovery cannot, therefore, be said to be due to allowance of cash discount and cannot be excluded from the sale price. The view taken by the Assistant Collector of Sales Tax in his order dated 28-2-1951 is correct.

Sd. P.N.Lad.
26/2

C.C.

Remembrancer of Legal Affairs.

U.R. to F.D. No. 5198, dated the 27th February 1952.

VOP. 18-3-56.

It is true that incorporation of trading corporation is a Union subject and the State Legislature is not competent to pass a law relating to trading corporation. But the Housing Board constituted under section 3 of the Bombay Housing Board Act, 1948, is created for the purpose of dealing with and satisfying the need of housing accommodation and if any business of selling or supplying goods is done it may be only incidental to its main object of constructing houses. Even though the Board is not a trading corporation if it is carrying on the business of selling or supplying gods etc. it would be considered as a dealer within the meaning of section 2(c) of the Bombay Sales Tax Act. 'Dealer' as defined by clause (c) of section 2 of the Bombay Sales Tax Act, 1946 means any person who carries on the business of selling or supplying goods in the State of Bombay, whether for commission, remuneration or otherwise and includes a State Government which carries on such business and any society, club or association which sells or supplies goods to its members. "Goods" means all kinds of moveable property other than actionable claims stocks shares and securities and includes all materials articles and commodities (section 2(d)). The supply of goods such as Iron, Steel and Cement by the Board to the contractors would not be an isolated instance but every time the Board proposes to build a house there would be such series of transactions. As such the supply of goods by the Board would be a sale within the meaning of clause (g) of section 2 and the Board would therefore be considered to be a dealer subject to registration under section 8. It is clear from the correspondence at pages 9-11 ante that even the Public Works Department which supplies building materials to contractor for Government work on the same terms and conditions as the Board supplies is liable for registration under the Act

The contention of the Board is that at the time of purchase of the materials by the Board the Board is duly charged the ~~s~~ sales tax and the same is paid by the Board and that if the Board is tobe treated as a 'dealer' his would be a case of double taxation. This is not correct and it would be in the interest of the Board to register itself as a dealer for in that case the Board would be entitled to purchase goods on a tax free basis after a license under section 8-B is issued or would be entitled to a set-off or refund under section 13-A of the Act.

Sd. P.M.Lad.
4/4

O.S.

Remembrancer of Legal Affairs.

U.R. to Labour and Housing Department (throught the Finance Department), No. 5121, dated the 4th April 1952.

VOP. 18-856-

Sales Tax Act, 1946 sec.2(h)(i) "sale price" deduction of freight.

The Sales Tax Tribunal has found that in some cases conveyance charges exceed the amount of the price of bricks as shown in the bills, while in charges worked comparatively too large. As however no other cases the conveyance tax can be charged on the amount of conveyance charges, the Tribunal remanded the case directing the Sales Tax Officer to fix the proper amount of conveyance charges in each such case and to deduct it and to treat the balance as "Sale Price" of the bricks. The Collector of Sales Tax holds that in such circumstances the Tribunal's decision to deduct certain estimated amounts as cartage, though these amounts had not been charged ~~separately~~ separately appears to be wrong. R.L.A. is requested to advise whether this view of the Collector of Sales Tax is correct.

The expression "sale price" as defined in section 2(h)(i) of the Bombay Sales Tax Act, 1946, excludes the cost of freight or delivery when such cost is separately chargod. In para 5 of its decision, the Tribunal remarks "Looking to the bills of the relevant period which were produced before us, we find that the price of bricks and carting charges have been separately mentioned." Even para 6. makes it clear that cartage charges were separately shown in the bills. As these cartage charges, though shown separately, exceeded ~~the~~ the price of the bricks, the Tribunal remanded the cases to the Sales Tax Officer to fix the proper or reasonable amount of conveyance charges in each case and it appears that he submitted his report accordingly. It will, therefore, be clear that the Tribunal fixed the reasonable amount of cartage charges in those cases where such ~~amount~~ amount though far too large, was separately shown in the bills. Consequently, the statement made by the Collector of Sales Tax at 'A' at p-3 ante is not

correct.

As regards the second question, the F.D. may frame a rule prescribing reasonable charges for conveyance or cartage (see rule 4 of the Bombay Sales Tax Rules, 1946, since deleted).

Ed. P.M.Lad.
19/4

C.C.

Remembrancer of Legal Affairs.

U.R. to F.D. No. 5095, dated the 21st April 1952.

VGP. 18-6-56.

Sales Tax Act, 1946
Sections 28A 29(2)(pp).
Rules 50B, 50C

Appearance of Sales Tax Practitioners.

Section 28.A of the Bombay Sales Tax Act 1946 provides that any dealer who is entitled to attend before any authority in connection with any proceedings under this Act, may attend before the authority- (a) by a person authorised by him or (b) by a legal practitioner, or (c) subject to such conditions as may be prescribed, by an accountant or sales tax practitioner who possesses the prescribed qualifications. Clause(pp)of section 29(2) provides for making of rules for conditions and the qualifications for the purposes of clause (c) of section 28A. Under Rule 50 B of the Sales Tax Rules an accountant or a sales tax practitioner appearing on behalf of a dealer in any proceedings before any Sales Tax Authority shall produce before such authority an authorisation given by the dealer in Form XXV- A. Sub-rules (1) and (2) of Rule 50-C provide the qualifications, an accountant or sales tax practitioner should possess for the purpose of clause (c) of section 28A. Sub-rule (3) of rule 50-C provides as follows:-

If any sales tax practitioner is found guilty of misconduct, in connection with any sales tax proceedings by the Collector, the Collector may direct that he shall be thereafter disqualified to represent a dealer under section 28-A of the Act. Provided that (a) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard; and (b) any person against whom such direction is made may, within one month of the making of the direction appeal to the Sales Tax Tribunal, Bombay to have the direction cancelled. It is clear therefore

that there is already a provision made in sub-rule (3) of rule 80-C of the Bombay Sales Tax Rules for disqualifying a sales tax practitioner if he is found guilty of misconduct. It is true that there is no provision for disqualifying a legal practitioner or accountant for misconduct under this rule. But in such cases they are punished either under the Bombay Pleaders Act, 1920 or the Bar Councils Act, 1926 or under section 29 of the Chartered Accountants Act, 1949. If a legal practioner or accountant is found guilty of misconduct in connection with any sales tax proceedings by the authority empowered to take disciplinary action against memebrs of the profession to which he belongs he can be disqualified to represent the dealer under section 28 A subject to same conditions as stated in the proviso to Rule 80 C (3) by amending section 28A of the Act on the lines of section 61(3) of the Indian Income Tax Act, 1922.

Sd. P.M.Lad.
23/6

C.C.

Remembrancer of Legal Affairs.

U.R. to F.D.No. 10442, dated the 23rd June1953.

VGP. 18-6-66.

The question referred to the R.T.A. for consideration is whether the sale of goods to a foreign going ship or aircraft, etc. which are intended to be consumed by the ship or aircraft during its voyage or flight outside the territory of India should be deemed to be a sale taking place in the course of export of the goods out of the territoty of India.

2. The answer to the question is in the affirmative. The word "export" has not been defined in the Constitution; but having regard to the legislative practice it can be fairly assumed to have been used in the sense in which it has been used in the Imports and Exports (Control) Act, 1947. Section 2 of that Act defines "export as meaning taking out of India by sea, land or air. If, therefore any goods are taken out of India by sea, land or air they can be deemed to have been exported within the meaning of the word "export" as used in Article 286(1)(b) of the Constitution. The question, therefore, is whether the sale of goods, such as fuel lubricating etc. to foreign going ships or aircraft can be considered to be a sale in the course of export of those goods out of the territory of India. In the recent case of the State of Travancore Cochin and others vs. the Bombay Company Ltd. the Supreme Court has considered the question of what is a sale of goods in the course of the export of goods out of the territory of India. The Supreme Court has observed that " a sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be effectuated dissociated from export without which it cannot be and the sale and resultant export form parts of a single transaction. Of these two integrated activities which together constitute

an export sale, whether first occurs can be well regard as taking place in the course of the other." It is true that in the above observations the Supreme Court have referred to the delivery of goods to a common carrier for transport out of the country by land or sea. But the core of the decision is that if there is a sale and the resultant export, they form part of a single transaction; and therefore the sale which first occurs can be regarded as taking place in the course of the other. In the present case the sale and the resultant export, that is, taking out of the territory of India of the goods sold form part of a single transaction and therefoere the sale which first takes place can be regarded as taking place in the course of the other. This view is also supported by the practice of the Customs Department in treating deliveries of the goods in question to international shipping and aircraft services as exports for the purposes of import and export duties.

Sd. P.M.Lad.
26/11

o.c.

Remembrancer of Legal Affairs.

U.R. to F.D. No. 19868B dated the 27th November 1958.

VGP. 18-6-56.

Bombay Sales Tax Act, 1952 Sec.2(14) - Exchange transactions in oils -

No general opinion can be expressed on this Question which is capable of covering every variety of an 'exchange' transaction. While applying the definition the substance of the transaction can alone be a satisfactory criterion. At ~~xxxxx~~ one end a mere barter or exchange is clearly excluded. At the other end comes a sale in its strictest sense meaning a transfer of property in goods for a price i.e. for a monetary consideration. It is doubtful whether the word Sale in Entry 54 of List II of the Seventh Schedule to the Constitution can be given a wider meaning so as to include exchange transaction therein. Therefore, it would be more reasonable to construe the words, "other valuable consideration" ejusdem generies with the preceding word as was contended in the case of In re: Jayarama Chettiar.

That decision seems to be of doubtful validity Consequently, I am inclined to hold that the transaction in oils etc. considered in this instance would not be a sale within the meaning of the definition of 'sale' appearing in section 3(14) of the Bombay Sales Tax Act, 1952.

Sd. P.H.Lad.
27/12

e.e.

Remembrancer of Legal Affairs.

U.R. to F.D. No. 21989/E dated the 29th Dec. 1952.

VGP. 18-6-56.